administrative law section newsletter

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SECTION GROWING RAPIDLY

Perhaps the most dramatic thing in administrative law since our last newsletter has been the growth of the section. As of March 15, the Administrative Law Section had 314 members, and the girls at the Bar report more lawyers joining every day. This growth certainly confirms the great interest of the Bar membership in administrative law and the desirability of section status.

There are several developments of general interest to the administrative law bar. First, the CLE group at The Florida Bar is working with the Administrative Law Section to put together a seminar which is tentatively scheduled for October. Section members who have comments or suggestions as to the format or content of the seminar should forward them to CLE Committee Chairman Harold Smithers. His address is:

Mr. Harold Smithers
Chief Hearing Examiner
Florida Public Service Commission
700 South Adams Street
Tallahassee, Florida 32304

Representative George Sheldon, Chairman of the Administrative Procedures Subcommittee of the House Governmental Operations Committee, has announced that his subcommittee will hold hearings on needed changes in the APA during the week of April 11 and has asked the Administrative Law Section to make a presentation. Accordingly, members of the Seciton should immediately forward comments or suggestions to Chairman-elect Ron LaFace so that a presentation can be put together. This is probably the best single opportunity Section members will have for meaningful input into the basic statute under which we all practice. It goes without saying that Ron's presentation can only represent those views which are made known to him, so if you have a concern or know of an area that needs change, let him know. His address is:

Mr. Ronald C. LaFace
Post Office Box 1752
Tallahassee, Florida 32302

Chairman-elect LaFace intends to appoint committees prior to The Florida Bar convention, June 15-17, 1977, so that they can have their first meeting at the Bar convention

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SECTION MEETING AT BAR CONVENTION

The Administrative Law Section will have a luncheon at The Florida Bar convention, Thursday, June 16, 12:00-1:30 p.m. Since the seating capacity of the room is limited, reservations will be taken on a first come, first served basis. Accordingly, Section members should return materials promptly when they receive the convention mail-out. The luncheon speaker will be Justice Art England, who will cover recent developments in administrative law. Justice England was the reporter for the Law Revision Council version of the APA. The luncheon program will carry designation credit as follows:

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1 hour - Administrative and Governmental Law
1 hour - Trial Practice
1 hour - Appellate Practice
1 hour - Environmental Law
1 hour - Registered General Practice

SECTION GROWING, cont'd.

as a convenience to all concerned. Section members should advise Ron of their preference in committee assignments at their earliest convenience at the above address. Committees are:

Newsletter Committee
CLE Committee
Legislation Committee
Annual Meeting Committee
Long Range Planning Committee
Membership Committee
Designation Plan Committee
Environmental Law Liaison Committee
Transportation Committee
Regulated Utilities Committee
Budget Committee
Universities, Community Colleges and School Board Committee
State Agency Practice Committee
Federal Agency Practice Committee

CASE COMMENT – "RULES"

There follow two cases of general interest to the Administrative Law Section. So far, Section members have not contributed any cases to the *Newsletter*. It would help put out a much more useful product if the Section membership would forward interesting cases to *Newsletter* editor Barrett Johnson. The emphasis is on cases on which the ink is hardly dry, so that they become available through the *Newsletter* before the advance sheets. Please forward cases to:

Mr. Barrett G. Johnson
3105 Ortega Drive
Tallahassee, Florida 32303

There has been a body of opinion within the administrative law Bar that an agency cannot waive its rules. This opinion has its roots in Section 120.52(14), which defines "rule" to include the amendment or repeal of a rule. This definition was somehow felt to imply that waiver necessarily fell within the ambit of "amendment" or possibly "repeal" of a rule, although there are obvious distinctions. Both amendment and repeal of a rule necessarily have consequences which are general in effect; waiver has consequences which are limited to the particular case at hand. In any event, the Supreme Court of Florida, speaking through Mr. Justice Sundberg, has laid the matter to rest in *United Telephone Co. of Florida v. Mayo, et al.*, Case No. 49,61[illegible] Opinion filed March 3, 1977.

Insofar as material here, the facts of the case are relatively simple.

Specifically, petitioner alleges that the Commission's action was unlawful because it arrived at this figure by taking judicial notice of evidence that was not a stated part of the Commission's decision in the Southern Bell case. The $993,000 figure was derived from evidence presented during the Southern Bell hearings.[5]

United points out that the Commission's actions were in disregard of its own Fla. Admin. Code Rule 25-2.111, which provides that the Commission may take judicial notice of its own decisions but not of the evidence upon which those decisions are based.

It is true that this action of the Commission was irregular. However, this Court will not overturn the Commission's order merely because it failed to comply with its own evidentiary rule. In *American Farm Lines Black Ball Freight*, 397 U.S. 532, 539 (1970), the United States Supreme Court articulated the general rule that:

"[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *NLRB v. Monsanto Chemical Co.*, 205 F2d 763, 764.

United has not shown that it has been substantially prejudiced by the Commission's failure to observe its own evidentiary rules. United was an intervenor in the Southern Bell Telephone docket and therefore had the opportunity to shape the record. Futhermore, the Commission's own rules show that it does not intend to be bound strictly by procedural rules. To illistrate, Fla. Admin. Code Rule 25-113 states that "exclusionary rules of evidence shall not be used to prevent the receipt of evidence having substantial probative effect."

Because petitioner was a participating intervenor in the docket where the evidence relied upon was developed, we cannot say that it was substantially prejudiced by the Commission's action. Absent such a showing, this Court cannot overturn the decision of an administrative agency.

From this opinion, it would appear clear that agencies do have the power to waive their own rules in appropriate cases. It would also appear that an agency can strengthen its case if it includes in its procedural rules language specifically providing flexibility. Similarly, it would appear that waiver by an agency might be more sucessfully attacked where no such provision exists. Interestingly, the Model Rules (Chapter 28, F.A.C.) do not appear to directly address the point, although it would appear to be a logical place to do so.

Price Wise et al. v. Nuzum, Case No. BB-350, Opinion filed February 2, 1977, currently on rehearing, the First District Court of Appeal in a unanimous opinion by Judge Mills differentiated between rules and declaratory statements. Petitioners sought review of a declaratory statement issued by the Division of Beverage revoking its prior interpretation of Rule 7A-4.50, F.A.C. The facts of the case, as cited by the Court, are:

On 26 January 1976, the present director issued a memorandum rescinding all prior memoranda regarding cooperative pool buying vendors. In response..., Petitioner, filed a petition for Declaratory Statement requesting a clarification of the Respondent's interpretation of Rule 7A-50..., the Respondent caused a Notice of Petition for Delcaratory Statement to be published...Rule...means each agency statement of general applicability that implements, interprets or prescribes law or policy or describes the organization, procedure or practice requirements of an agency and includes the amendment or repeal of a rule.

The Declaratory Statement is a rule...because it is an agency statement of general applicability that implements, interprets and prescribes law or policy. It expressly rescinds the prior interpretation given Rule 7A-4.50 as it relates to the Tied House Evil Law, and sets forth a new interpretation of that law.

Section 120,52(14) also states that the term "rule" does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public.

(b) Legal memoranda or opinions sued to an agency by the attorney general or agency legal opinions prior to their use in connection with the agency actions, or...

The Declaratory Statement does not fall within one of these exceptions because it is final agency action which affects the private interest of vendors belonging to cooperative pooling groups. Therefore, the Declaratory Statement falls within the general definition of rule, because it is a general principle of statutory construction that where a statute sets forth exceptions, no others may be implied to be intended. (citations omitted)

Section 120.54, Florida Statutes (1975), sets forth the procedure for the adoption, amendment or repeal of any rule by an administrative agency.

The Respondent failed to comply...and therefore did not give proper notice... In addition, the Declaratory Statement did not set forth an estimate of the economic impact...

The Respondent contends that Section 120.565, Florida Statutes (1975), controls the procedure applicable to the statement at issue here rather than Section 120.54. This would be true if the Respondent's statement dealt with the applicability of a statutory provision, or rule, or agency order. But such is not the case here. The Respondent's statement is of general applicability, implementing, interpreting and prescribing law or policy, expressly rescinding its prior interpretation of its Rule 7A-4.50 as it relates to the Tied House Evil Law, and setting forth a new interpretation of that law.

Thus, it would appear that the Court has expressly recognized the difference between statements applicable to individual cases and those which are generally applicable and therefore fall within the definition of a rule. Of course, there remains a gray area. Clearly, the

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"RULES", cont'd.

first applicant for a declaratory statement is an individual case. At some point, if others in identical or substantially similar fact situations ask the same question and are given the same answer, the line between declaratory statement and generally applicable rule will have been crossed. Where that line lies will probably have to be determined on a case-by-case basis. □

[5] In Order No. 7238, the Commission said:

Since the figures supplied by United are incorrect, similar calculations are also required in this docket. Utilization of this calculation requires reference to evidence in the Bell case beyond the facts cited in Order No. 7018. Normally, official notice of facts not found in the Order will not be taken. Where, as here, however, the Company's figures cannot be relied upon, the Commission must use such other evidence as is reliable. We refer to the evidence in Docket No. 74805-TP. United was a full party to this proceeding for the purpose of supporting Bell's request for additional revenues and the present method of division of intrastate toll revenues.

As a party, it is familiar with the evidence and testimony presented by Bell: Further, as an intervenor, it was entitled to present evidence and testimony of its own.

MEETING NOTICES

Recently, a substantial number of notices of meetings or workshops have appeared in the Florida Administrative Weekly less than seven days in advance of the meeting or workshop and the matter is being checked into by the Administrative Procedures Committee staff. Interestingly, Section 120.53(1)(d) requires that the agenda must be available so that it "may be received at least 7 days before the event," but it does not contain an express time requirement for notice. However, Rule 28-2.01(1) does make express the requirement of 7 days notice for a meeting:

> (1) Except in the case of emergencies, school districts, community colleges districts, or units of government with jurisdiction in only one county, the Agency shall give at least seven (7) days public notice of any meeting or workshop by publication in the Florida Administrative Weekly.

The definitions of 28-2.01 (4) and (5) are also of interest:

> (4) A meeting, for the purposes of notice herein, is limited to a gathering for the purpose of conducting public business by a collegial body constituting the Agency head.
>
> (5) A workshop is a conference where a majority of the members of a collegial agency head are present or a committee designated by the agency head are meeting for the specific purpose of rule drafting at which time no official votes are to be taken or policy adopted.

Given the foregoing, it would appear that action taken at a meeting held on less than 7 days notice could be questioned, although Section 120.53(3) might imply that actual knowledge might be an effective substitute for notice. □